



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

SEP 17 2013

Brett Kappel  
Arent Fox LLP  
1050 Connecticut Avenue, NW  
Washington, DC 20036

RE: MUR 6657  
W. Todd Akin  
Akin for Senate and G. Scott Engelbrecht in  
his official capacity as treasurer

Dear Mr. Kappel:

On October 10, 2012, the Federal Election Commission notified your clients, W. Todd Akin and Akin for Senate and G. Scott Engelbrecht in his official capacity as treasurer (the "Committee"), of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended (the "Act"). On September 10, 2013, the Commission found, on the basis of the information in the complaint, and information provided by your clients, that there is no reason to believe that W. Todd Akin or the Committee violated 2 U.S.C. §§ 441a, 441b, or 441i(e). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Peter Reynolds, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

William Powers  
Assistant General Counsel

Enclosure  
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION**

**FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS:** W. Todd Akin

**MUR: 6657**

Akin for Senate and G. Scott Engelbrecht  
in his official capacity as treasurer

**I. INTRODUCTION**

This matter was generated by a complaint filed by the Missouri Democratic State Committee. *See* 2 U.S.C. § 437(g)(a)(1). The Complaint alleges that W. Todd Akin and Akin for Senate were about to violate the Federal Election Campaign Act, as amended (the "Act") by receiving an illegal in-kind contribution as a result of a coordinated communication. 2 U.S.C. §§ 441a(a), 441b. The Complaint further alleges that Akin may have violated 2 U.S.C. § 441i(e) by soliciting funds that are in excess of federal limits, prohibited under certain source restrictions, or not in compliance with certain reporting requirements. As discussed below, the Commission finds no reason to believe that Akin or Akin for Senate violated 2 U.S.C. §§ 441a(a), 441b, or 441i(e).

**II. FACTUAL AND LEGAL ANALYSIS**

**A. Facts**

The Senate Conservatives Fund registered with the Commission as the leadership PAC of then-Senator Jim DeMint on April 15, 2008. Statement of Organization (Apr. 15, 2008), <http://images.nictusa.com/pdf/797/28039690797/28039690797.pdf>. The group most recently amended its Statement of Organization in July 2012 to remove DeMint as sponsor and MINT PAC as an affiliate. Amended Statement of Organization (July 1, 2012), <http://images.nictusa.com/pdf/394/12952245394/12952245394.pdf>. The Senate Conservatives

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1 Fund now files as a multicandidate committee. March 2013 Monthly Report (Apr. 19, 2013),

2 <http://images.nictusa.com/pdf/205/13961856205/13961856205.pdf>.<sup>1</sup>

3 Akin was a candidate for the U.S. Senate in 2012, and Akin for Senate was his principal  
4 campaign committee. According to the Complaint, after August 19, 2012, several entities  
5 previously supporting Akin withdrew their support for his candidacy. Compl. at 2. Beginning  
6 on September 14, staff of the Senate Conservatives Fund and Akin for Senate engaged in several  
7 conversations that both Respondents have attested were strictly limited to Akin's position on the  
8 issue of banning earmarks, a cause that the Senate Conservatives Fund supports. See Akin Resp.  
9 at 3-4, 7, Ex. 1; Senate Conservatives Fund Resp. at 1-3, Ex. 1. Following that conversation, the  
10 Senate Conservatives Fund emailed its members on September 25 and asked them whether it  
11 should endorse Akin's candidacy and, if so, how much money they would be willing to donate to  
12 Akin's campaign. Senate Conservatives Fund Resp., Exs. 1, 3. Based on the responses it  
13 received, the Senate Conservatives Fund endorsed Akin's candidacy on September 27. *Id.*, Ex.  
14 I. The Senate Conservatives Fund reported making several independent expenditures in support  
15 of Akin in the weeks leading up to the 2012 general election, spending a total of \$118,160.72.  
16 Each of the reported expenditures was for either "Online Processing" or "Email List Rental" —  
17 that is, for "rental of fundraising donor lists from whom [the Senate Conservatives Fund]  
18 solicited, received and forwarded bundled contributions to the Akin campaign and for the costs

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<sup>1</sup> The Complaint mistakenly alleges that the Senate Conservatives Fund "remove[d] its affiliation with Senator DeMint so that it could operate as a so-called 'super PAC.'" Compl. at 2. According to the Senate Conservatives Fund, it is a "traditional" non-connected political committee, and therefore the contributions it receives, and independent expenditures it makes, are all subject to the limits and other prohibitions of the Act. Senate Conservatives Fund Resp. at 2. The Commission's records appear to confirm the Senate Conservatives Fund's statement. See March 2013 Monthly Report (Apr. 19, 2013), <http://images.nictusa.com/pdf/205/13961856205/13961856205.pdf>. A similarly named committee called "Senate Conservatives Action" is an independent expenditure-only political committee, however, and thus it is possible that the Complainant confused the two entities. See Statement of Organization (July 2, 2012), <http://images.nictusa.com/pdf/887/12030824887/12030824887.pdf>. According to reports filed with the Commission, Senate Conservatives Action has not made any independent expenditures in support of Akin.

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1 of online fundraising by [the Senate Conservatives Fund]for bundled contributions to the Akin  
2 campaign.” *Id.* at 2, Ex. 5.

3 The Complaint cites press reports from September 21-24 asserting that Akin “specifically  
4 agreed to [the Senate Conservatives Fund]’s earmark ban in order to receive fundraising support  
5 from” the Senate Conservatives Fund. Compl. at 2, Ex. 1-3. Although the Complainant was not  
6 aware of any communications by the Senate Conservatives Fund at the time, the Complaint  
7 asserts that, “should [the Senate Conservatives Fund] sponsor communications in connection  
8 with the Missouri Senate election, Akin and [the Senate Conservatives Fund] would violate” the  
9 Act. *Id.* at 2.

10 The Senate Conservatives Fund Response claims that “there were no communications or  
11 interactions between the Akin campaign and [the Senate Conservatives Fund] that would satisfy  
12 the conduct standard . . . nor was there any public political advertising by [the Senate  
13 Conservatives Fund] regarding Todd Akin,” and thus the Complaint is “purely speculative.”  
14 Senate Conservatives Fund Resp. at 2 (emphasis omitted). The Akin Response similarly states  
15 that (a) discussions between Akin for Senate and the Senate Conservatives Fund were “strictly  
16 limited” to Akin’s position on the issue of banning earmarks, and “did not include any discussion  
17 of the Akin for Senate campaign’s plans, projects, activities or needs”; (b) the Senate  
18 Conservatives Fund never ran any advertisements supporting Akin; and thus no violation  
19 occurred. Akin Resp. at 3 (emphasis omitted).

20 These assertions are buttressed by two affidavits submitted by the Respondents. First,  
21 Matt Hoskins, the executive director of the Senate Conservatives Fund, provided an affidavit in  
22 which he attests that he had discussions with the Akin staff, but at no time did they discuss the  
23 “‘needs, activities, plans or projects’ of the Akin campaign.” Senate Conservatives Fund Resp.,

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Ex. 1. Second, Justin Johnson, the policy director for Akin for Senate during the relevant time period, submitted an affidavit in which he similarly states that his discussions with the Senate Conservatives Fund's staff "were strictly limited to Representative Akin's position on [banning earmarks] and the rules of the U.S. Senate and House of Representatives governing earmarks," and that at no time did they discuss "the campaign's plans, projects, activities or needs." Akin Resp., Ex. 1.

**B. Analysis**

**1. Neither Akin Nor Akin for Senate Received a Coordinated Communication**

The Act prohibits corporations from making contributions from their general treasury funds in connection with any election of any candidate for federal office. 2 U.S.C. § 441b(a). Further, no candidate or political committee may knowingly accept a corporate contribution. *Id.*

Additionally, an expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees or their agents" constitutes an in-kind contribution to that candidate. 2 U.S.C. § 441a(a)(7)(B)(i); 11 C.F.R. § 109.21(b). Under Commission regulations, a communication is coordinated with a candidate or authorized committee when the communication is (1) paid for, in whole or part, by a person other than that candidate or authorized committee; (2) satisfies at least one of the content standards described in 11 C.F.R. § 109.21(c); and (3) satisfies at least one of the conduct standards described in 11 C.F.R. § 109.21(d). 11 C.F.R. § 109.21(a)(1)–(3).

The first requirement was met here. The Senate Conservatives Fund, an entity other than Akin or Akin for Senate, reported making \$118,160.72 in expenditures for "donor list rentals used for fundraising solicitations urging conservatives to contribute to Rep. Akin's campaign . . . and online fundraising processing costs and fees." Senate Conservatives Fund

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1 Resp. at 1-2. Even though the communications themselves may have been created at little cost,  
2 the Senate Conservatives Fund incurred significant related expenses. In the most basic sense, it  
3 financed a communication.

4 The second requirement, however, is not met. The Senate Conservatives Fund  
5 solicitations do not satisfy the content requirement because they are neither electioneering  
6 communications nor public communications. 11 C.F.R. § 109.21(c)(1)-(5). An electioneering  
7 communication is any broadcast, cable, or satellite communication that (1) refers to a clearly  
8 identified candidate for federal office; (2) is publicly distributed within 60 days of the relevant  
9 general election or 30 days of the relevant primary election; and (3) is targeted to the relevant  
10 electorate. 11 C.F.R. § 100.29(a). The Senate Conservatives Fund's communications were not  
11 distributed by broadcast, cable, or satellite, and are therefore not electioneering communications.

12 Nor were they public communications. A "public communication" is defined as

13 a communication by means of any broadcast, cable, or satellite  
14 communication, newspaper, magazine, outdoor advertising facility, mass  
15 mailing, or telephone bank to the general public, or any other form of  
16 general political advertising. The term *general public political advertising*  
17 shall not include communications over the Internet, except for  
18 communications placed for a fee on another person's Web site.  
19

20 11 C.F.R. § 100.26 (emphasis added). The expenditures made by the Senate Conservatives Fund  
21 in support of Akin were all devoted to either "Email List Rental" or "Online Processing."

22 Communications over the Internet are specifically exempt from the definition of "public  
23 communication" unless placed for a fee on a third party website. 11 C.F.R. § 100.26.

24 The record does not reflect that the Senate Conservatives Fund's fundraising  
25 communications were placed for a fee on another website. The Commission has narrowly  
26 interpreted the term Internet communication "placed for a fee," and has not construed that phrase  
27 to cover payments for services necessary to make an Internet communication. See Factual &

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1 Legal Analysis at 11, MUR 6414 (Carnahan in Congress Committee et al.) (payment for research  
2 services used to make website does not result in website being placed for a fee).

3 Therefore, the Senate Conservatives Fund's communications were neither electioneering  
4 communications nor public communications, and thus do not satisfy the content requirement of  
5 11 C.F.R. § 109.21(c).

6 Because the content requirement was not satisfied, there was no coordinated  
7 communication under 11 C.F.R. § 109.21, and no contribution by the Senate Conservatives Fund  
8 to Akin or Akin for Senate. Accordingly, the Commission finds no reason to believe that Akin  
9 or Akin for Senate and G. Scott Engelbrecht in his official capacity as treasurer violated 2 U.S.C.  
10 §§ 441a or 441b.

11 2. Akin Did Not Solicit Non-Federal Funds in Violation of Section 441i(e).  
12

13 The Act prohibits candidates from soliciting funds in connection with a federal election  
14 unless the funds are subject to the limitations, prohibitions, and reporting requirements of the  
15 Act. 2 U.S.C. § 441i(e)(1)(A); 11 C.F.R. § 300.61. The Complaint alleges that "[i]f Akin asked  
16 [the Senate Conservatives Fund] to make expenditures in connection with his campaign, Akin  
17 would have solicited contributions in excess of the federal limits." Compl. at 4.

18 In this context, a violation of section 441i(e)(1)(A) would require both that Akin asked  
19 the Senate Conservatives Fund to spend funds in connection with a federal election, and that  
20 those funds were not subject to the Act. But, as discussed above, the record does not support  
21 either conclusion. First, Akin and the Senate Conservatives Fund appear to have discussed only  
22 policy issues pertaining to banning earmarks. See Akin Resp. at 3-4, 7, Ex. 1; Senate  
23 Conservatives Fund Resp. at 1-3, Ex. 1. And both the Hoskins and Johnson affidavits deny that  
24 Akin ever solicited soft money or the payment of advertisements. Senate Conservatives Fund.

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1 Resp., Ex. 1 (Hoskins Aff. ¶ 36); Akin Resp., Ex. 1 (Johnson Aff. ¶ 5). Second, all funds  
2 received and spent by the Senate Conservatives Fund were subject to the limitations,  
3 prohibitions, and reporting requirements of the Act, because the Senate Conservatives Fund is a  
4 registered non-connected political committee. *See, e.g.*, March 2013 Monthly Report (Apr. 19,  
5 2013), <http://images.nictusa.com/pdf/205/13961856205/13961856205.pdf>.

6 For those reasons, Akin did not solicit funds in violation of section 441i(e). Accordingly,  
7 the Commission finds no reason to believe that Akin or Akin for Senate and G. Scott  
8 Engelbrecht in his official capacity as treasurer violated 2 U.S.C. § 441i(e).

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